IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD
(Special Original Jurisdiction)
THURSDAY, THE TWENTY FOURTH DAY OF JUNE
TWO THOUSAND AND FOUR

PRESENT
THE HON'BLE MR JUSTICE V.V.S.RAO

WRIT PETITION NO : 10087 of 1994

Between:
Anwar Brother Rep by its Proprietor Mohd.Moulana Hussain
S/o.Mohd.Hussain, R/o.19-2-227/4/1, Bahadurpura ,Hyderabad.

..... PETITIONER

AND

1 The A.P.State Transport Corporation Rep by its M.D
Musheerabad , Hyderabad.
2 The Dy.Manager (Materials) D& T, A.P.S.R.T.C ,Vizianagaram.

....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ of Mandamus of other appropriate order or direction in the nature of writ declaring that the imposition of penalty by the respondent corporation is arbitrary unreasonable, unconscionable and opposed to public policy and unconstitutional and that the letters Dt: 22-2-1994 and 24-3-1994, 5-5-1994 in so far as they levy penalty are illegal and bad in law and consequently direct the respondents to extend the time for paying the balance amount without levying and penalty by granting reasonable time of 3 months or such other period as this Hon'ble court may deem fit and proper and pass such other or further orders.

Counsel for the Petitioner: MR.B.NALIN KUMAR

Counsel for the Respondents: MR.Y.V.SWAMY, Standing Counsel for APSRTC.

The Court Made the Following :

ORDER:

The petitioner is a proprietary concern carrying on the business of dealing in scrap material particularly scrap from unserviceable vehicles auctioned by Andhra Pradesh State Road Transport Corporation (for short, the Corporation), the respondent herein. The petitioner has other sister concerns, namely, M/s.Brother Enterprises, M/s.Sarwar Enterprises, M/s.Akhtar Enterprises, and M/s.Viquar Brothers, who are controlled by the members of the petitioner's family.

In the auction held by the second respondent on 19.01.1994 for sale of unserviceable vehicles, the petitioner was successful bidder in relation to 11 lots by quoting Rs.9,27,040.75 (Rupees nine lakh twenty seven thousand forty and paise seventy five only). The offer made by the petitioner was confirmed. However, the petitioner did not pay the amount. The petitioner, therefore, approached the second respondent, who permitted him to pay the balance amount in two instalments. The petitioner again submitted an application on 15.03.1994 seeking extension of time. Again time was extended up to 31.03.1994 with penalty at 27% per annum i.e.Rs.393/- per day in respect of first instalment and Rs.227.70 ps per day in respect of second instalment. The second respondent again issued another letter dated 05.05.1994 calling upon the petitioner to pay 1% penalty per day with respect to each instalment on or before 16.05.1994. He was also informed that failing to do so, will entail forfeiture of the amounts already paid. Contending that the respondents have no such power to impose penalty, the present petition is filed seeking a declaration that the action of the respondents in imposing penalty is unconscionable, unreasonable, unconstitutional and opposed public policy and for a further declaration that Clauses 14 and 18 of the terms and conditions of tender-cum-auction as also the letters imposing penalty are illegal.

This Court admitted the writ petition on 01.06.1994 and passed interim orders permitting the petitioner to lift the material by depositing tender amount including ground rent within three weeks of the date of the order. This Court also observed that question of penalty will be decided at the time of final hearing of the writ petition.

The Senior Law Officer of first respondent has filed a counter affidavit on behalf of the respondents opposing the writ petition. It is stated that as per the terms and conditions of the tender, the petitioner paid 5 per cent of the amount as Earnest Money Deposit (EMD) in order to participate in the tender and that after the petitioner became successful bidder, the second respondent issued a letter dated 22.02.1994 asking the petitioner to pay the balance amount in two instalments. The petitioner submitted a representation asking extension of time. The respondents gave time thrice upto 30.03.1994, 12.04.1994 and 22.04.1994 with minimum penalty of 27% and 38% per annum as against 1% penalty per day for delayed payment as per Clause 18 of terms and conditions of the tender. The petitioner did not pay the amount and therefore the second respondent issued a letter dated 05.05.1994 asking the petitioner to pay the amount in extended time with nominal penalty. As he failed to do so, final notice was issued as per Clause 17 of terms and conditions.

The learned counsel for the petitioner Sri B.Nalin Kumar submits that the terms and conditions permit the Corporation to impose penalty only when there is damage to the Corporation and in the absence of any damage, the respondents cannot impose any amount as penalty without prior determination of such damages. He placed reliance on the decision of the Supreme Court in **Fatehchand v Balkishan Dass**[1]. **Per contra**, the learned counsel for A.P.S.R.T.C. Sri Y.V.Swamy submits that the Corporation demanded penalty strictly in accordance with the terms and conditions of the auction and therefore no interference is called for. He also submits that the petitioner participated in the auction for all the lots knowing fully well the conditions of auction and therefore he cannot turn around and question Clauses 14 and 18, especially when he has, on three occasions, sought extension of time for payment of bid amount.

It is well settled that the terms and conditions of auction are in the nature of binding instructions (See **Ramana Dayaram Shetty v International Airport Authority of India**[2]). Therefore, the terms and conditions of auction bind both the petitioner as well as the respondents. Nonetheless it must be noted that when the terms and conditions of auction of property held by public authority are unreasonable, irrational and unconstitutional and fail to satisfy the tests of legality, rationality and propriety, such conditions can always be invalidated by the Court exercising power of judicial review. (See **Tata**

Cellular v Union of India[3]**).** In this case, however, the challenge to Clauses 14 and 18 must fail for reasons more than one.

Admittedly, the petitioner and as many as five of its sister concerns are engaged in the business of dealing in scrap material particularly scrap from unserviceable vehicles (Buses). In the absence of any denial that the terms and conditions enforced by the Corporation for sale of such unserviceable vehicles equally apply to all such sales including the auction held in 1994, the petitioner having participated in the auction on its own volition, there should be strong reasons to accept the submissions that Clauses 14 and 18 are arbitrary and irrational. These two Clauses read as under:

> 14. Incidental Charges: The purchaser shall have to pay the incidental charges at 1% along with EMD in auction to the Sr.Manager (Finance), APSRTC, Vizianagaram as case may be.
>
> 18. Penalty for delayed payment: 1% of the total value of the unserviceable Materials/Vehicles shall be charged per day as penalty for delayed payment.

Clause 14 imposes obligation on a purchaser to pay 1% incidental charges along with EMD, which is to be paid at 5% of the quoted value (as per condition 12(1)). Clause 18 gives right to the Corporation to impose 1% of the total value of the unserviceable material/vehicles per day as penalty for delayed payment. Be it noted that as per Clause 17, successful tenderer shall have to pay full amount within the last date stipulated in the intimation, where the bid is accepted and failure to deposit the total value after receipt of the intimation accepting the tender, the Corporation shall be entitled to take whatever action that is advisable to dispose of unserviceable vehicles. It further stipulates that the purchaser shall arrange the removal of the items purchased within seven working days of Stores after payment unless otherwise permitted by the Corporation. Clause 17 does not admit any doubt as to the obligations of the Corporation and the successful bidder. It also gives discretion to the Corporation and its authorized representative to permit the payment of the quoted price beyond the stipulated time.

In this case, there is no denial that as the petitioner failed to pay the amount within the stipulated time as intimated in the letter dated 22.02.1994 on or before 03.03.1994, he was asked to pay 1% penalty of the total value thereafter. Though this condition was mentioned in the said letter itself, the petitioner did not pay, but he requested for

extension of time, which was admittedly granted on three occasions. Thereafter, he was asked to pay the penalty of 1% with effect from 12.03.1994 on the instalments payable. Neither the Clauses permitting the imposition of penalty nor the action invoking such clause, can be held to be arbitrary as the petitioner repeatedly failed to fulfil his part of contract under the terms and conditions particularly when it is inseparable condition for the very acceptance of the tender. Reading Clauses 12(1), 14, 17 and 18 together, it is not possible to accept the condition that the penalty imposed for the delayed payment is in the nature of damages. The penalty clause is condition of acceptance of the tender. When the petitioner takes advantage of the acceptance of the tender, he has either to accept his part of the contract wholly or reject as wholly. He cannot be permitted to accept one part and ignore the other part i.e. payment of penalty.

Clause 24 of the terms and conditions of auction postulates that 1% of the total value of the unserviceable vehicles shall be charged per day as ground rent if the material is not removed from the premises of the Corporation within the delivery period unless extension is granted. This is altogether different from the obligation that arises under Clauses 17 and 18. Further the damages to the premises of the Corporation is altogether different matter covered by Clause 28. The Clause permits damages making the buyer responsible for such damage to the Corporation by non-removal of vehicles. This is altogether different. This distinction has to be kept in mind while considering the decision of the Supreme Court in **Fatehchand v Balkishan Dass** (Supra).

In the said Supreme Court case, it was emphatically laid down by the Constitution Bench of the Supreme Court that Section 74 of the Contract Act, 1872, applies to stipulation for forfeiture of amounts deposited or paid under the Contract. The petitioner was required to pay EMD as per Clause 12(1) and incidentals at 1% of the EMD. The decision in Supreme Court can apply to these amounts and not to the amounts levied by Corporation under Clause 17 read with Clause 18. The case of the Corporation levying and claiming damages under Clause 28 is altogether different, (as noticed hereinabove) from a case where the petitioner having availed extension of time thrice, still failed to pay the quoted price and further failed to discharge the obligation of removing vehicles within seven days after making full payment. Therefore, the decision cited by the learned counsel has no application.

In the same back ground of facts, the Writ Petition No.9928 of

1994 was filed. By an order dated 16.06.2004, I dismissed the Writ Petition observing as under:

> Though the counter affidavit is filed on 08.07.1994, the petitioners have not filed any reply denying the counter allegations. Be that as it is, the dual relationship between the petitioners and respondent is traceable to terms and conditions for auctioning unserviceable vehicles. These terms and conditions are binding on both the parties and therefore if either of the parties to the contract seeks to enforce, a writ petition is not a proper remedy. Further I fail to see any arbitrariness or irrationality in imposing penalty.

The dispute raised here is purely in the realm of Contract in Private Law and the Public Law has no application. The writ petition is wholly misconceived and is accordingly dismissed.

(V.V.S.RAO,J)

24.06.2004
pln

ASSISTANT REGISTRAR

//TRUE COPY//

SECTION OFFICER

To

1. The Managing Director, APSRTC, Musheerabad, Hyderabad.
2. The Deputy Manager (Materials) D&T, APSRTC, Vizianagaram.
3. 2 CD copies.

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[1] AIR 1963 SC 1405

[2] AIR 1979 SC 1628

[3] AIR 1996 SC 11